United States Postal Service *and* National Association of Letter Carriers. Case 02–CA–219434

December 16, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On May 3, 2019, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The Respondent filed exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order, except that the attached notice is substituted for that of the administrative law judge.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Postal Service, New Rochelle, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[1] Chairman Ring is recused and took no part in the consideration of this case.

[2] In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by refusing to permit employee Christopher White to speak with a representative prior to continuing his April 6, 2018 investigatory meetings with management. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The Respondent excepts to the judge's factual finding that New Rochelle Postmaster Edward DiPasquale knew of White's request to speak with a representative before discharging him on April 6. We find no merit in this exception because, based on the record as a whole, the General Counsel established that the Respondent had sufficient knowledge of White's protected activity at the time DiPasquale discharged him for it to have motivated his decision.

Member Kaplan would find that the General Counsel established the requisite knowledge through White's requests for a representative in his meetings with supervisor Anthony Bardis and manager Angela Cail and their attendance at his subsequent meeting with DiPasquale. See, e.g., *Amoco Oil Co.*, 278 NLRB 1, 8 (1986); *Lennox Industries, Inc. v. NLRB*, 637 F.2d 340, 345 (5th Cir. 1981), enforcing 244 NLRB 607, 608 (1979). Accordingly, he finds it unnecessary to pass on the judge's suggestion that White's question to DiPasquale—"if there is anybody I can . . ."—was an effective *Weingarten* request.

The judge, applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), concluded that the Respondent violated Sec. 8(a)(1) by discharging White. As the judge found, the Respondent failed to demonstrate that, in the absence of White's protected activity, it would have discharged him anyway because its other rationales for his discharge were "plainly pretext." In fact, the judge made explicit findings—which the Respondent did not except to—discrediting the Respondent's assertion that White had attendance and performance issues, much less that the Respondent actually relied on them in discharging him. We note that the same conclusion would be warranted under *Atlantic Steel*, 245 NLRB 814 (1979). Given the judge's implicit discrediting of testimony regarding White's alleged misbehavior at the April 6 meeting with DiPasquale and his related finding that "nothing of significance occurred between [White's] request for a union representative and his discharge except for his insistence that he was entitled to that," the record shows that White was discharged for requesting a *Weingarten* representative and did nothing to lose the protection of the Act.

Member Kaplan would find a violation based only on *Atlantic Steel* and would not rely on the judge's application of *Wright Line*, including his finding of pretext. DiPasquale's testimony that White's misconduct during their April 6 meeting was the "real reason" for his discharge did not itself invalidate the attendance and scheduling issues cited in the discharge letter as supplemental grounds for discipline. The fact that an employer has multiple reasons for a discharge but does not subsequently emphasize all of them does not necessarily show shifting reasons indicative of pretext. See, e.g., *River Ranch Fresh Foods, LLC*, 351 NLRB 115, 116–117 (2007); *Volair Contractors, Inc.*, 341 NLRB 673, 677 (2004); *Vulcan Basement Waterproofing v. NLRB*, 219 F.3d 677, 689 (7th Cir. 2000). And although the judge discredited testimony that White failed to show up for work on several prior occasions, the Respondent's displeasure with White's attendance/scheduling issues on the morning of April 6 was apparent *before* the related investigatory meeting that led to his discharge. In any event, because the Respondent's predominant reason for discharging White was his alleged misconduct in asserting his Sec. 7 rights, Member Kaplan would find *Wright Line* inapplicable. See, e.g., *Entergy Nuclear Operations, Inc.*, 367 NLRB No. 135, slip op. at 1 fn. 1 (2019).

[3] We shall substitute a new notice to conform to the Board's standard remedial language.

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse your requests for union representation during investigatory meetings that you reasonably believe may result in discipline.

WE WILL NOT discharge or otherwise discriminate against you for engaging in activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Christopher White full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher White whole for any loss of earnings and other benefits resulting from his discharge, less any interim earnings, plus interest, and WE WILL also make such employee whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Christopher White for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Christopher White, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

UNITED STATES POSTAL SERVICE

The Board's decision can be found at www.nlrb.gov/case/02-CA-219434 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Gregory B. Davis, Esq., for the General Counsel.
Roderick D. Eves, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The charge in Case 02–CA–219434 was filed on April 30, 2018. The first amended charge was filed on May 29, 2018. The complaint was issued on September 27, 2018.

The complaint alleges that on or about April 6, 2018, Respondent United States Postal Service violated Section 8(a)(1) of the Act by denying employee Christopher White[1] his repeated requests to speak with a Union representative during an interview. The complaint further alleges that Respondent violated Section 8(a)(1) by continuing the April 6, 2018 interview with White without a representative, and then terminating White's employment that same day because he had requested a representative. (GC Exh. 1).[2] Respondent denies the substantive allegations of the complaint.[3]

Beginning January 14, 2019, and ending January 15, 2019, I conducted a trial at the Board's New York Regional Office, at which all parties were afforded the opportunity to present their evidence. On February 12, 2019, the General Counsel and Respondent each filed timely briefs. Upon consideration of the entire record and the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on the pleadings herein, Respondent admitted and I find that the Board has jurisdiction over Respondent by virtue of Section 1209 of the Postal Reorganization Act, 39 U.S.C. Section

[1] Mr. White's full name is Christopher Kenneth White, Jr.

[2] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for joint exhibits, "GC Exh." for the General Counsel's exhibits and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review, and are not necessarily exclusive or exhaustive.

[3] In its Answer, Respondent had inadvertently admitted to Paragraph 5(e) of the Complaint, alleging Respondent had terminated White because of his concerted activities. Respondent intended to have admitted only Paragraph 5(d), acknowledging merely that it had terminated White, but denying its alleged motive. Respondent moved without objection to amend its Answer to correct that inadvertent error, and I granted that amendment.

101 et seq. (hereinafter "PRA"). Respondent further admitted, and I find, that the Charging Party, National Association of Letter Carriers (hereinafter "the Union") is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent provides postal services for the United States and operates various facilities throughout the United States in performing that function, including its facility at 255 North Ave., New Rochelle, NY (hereinafter "the New Rochelle Main Branch"). Respondent's city letter carriers, including its city carrier assistants (hereinafter "CCAs") are represented by the Union, and are covered by a collective bargaining agreement, the most recent of which is the 2016-2019 National Agreement between the Union and Respondent. (Jt. Exh. 1).

Christopher White was employed as a CCA from approximately January 6, 2018, until his discharge on April 6, 2018. White testified at the hearing regarding his employment with Respondent, and the events leading up to his discharge. Also testifying at the hearing for the General Counsel was the Union's Local Branch 137 President, Joseph DiStefano. Testifying for Respondent were White's supervisor Anthony Bardis, Bardis's manager Angela Cail and New Rochelle Postmaster Edward DiPasquale.

White's Training and Employment

White began a paid training program with Respondent in or about late December 2017, ahead of his official January 6, 2018 start date as a CCR.[4] The training took place in two locations, part in White Plains, NY and part in upstate New York. Among the subjects covered at the training was the instruction that CCAs were not required to answer their personal phones outside of working hours. The training also included a presentation by the Union, during which that instruction was reiterated.[5]

White's primary duty was to deliver mail. From the time he began working until his discharge, White was primarily assigned to work out of the New Rochelle Main Branch, but on occasion he would be assigned to work out of other locations in the region, including White Plains, Larchmont and Mt. Vernon, New York. He traveled to those locations without incident. At all relevant times, White was living in Mt. Vernon, and relied on public transportation to travel to and from work at the New Rochelle Main Branch. His supervisors were aware of his reliance on public transportation, and Cail acknowledged at the trial that this was not a problem.

White's typical work hours were Monday through Saturday, from 10:30 a.m. to 6:00 p.m. or 7:00 p.m., depending on the workload. Some weeks, he also worked on Sunday delivering packages. There were other weeks when he earned additional overtime as well. Because he relied on public transportation to get to work, he normally left his home at 9:30 a.m. to catch the bus, which was about a 15-minute ride to New Rochelle. His normal total commute was about 30 minutes door to door, but varied on days when he was assigned to other than his usual location.

Typically, White received his work location assignment before leaving at the end of the prior day. There was no posted schedule, so he would have to receive his assigned location each day directly from his supervisor.[6] Ordinarily, he would get this assignment in person, but there were times when his supervisor would call or text him with this assignment later that evening. Sometimes, if he had not heard from his supervisor, White would initiate the call to find out where to arrive the following morning. On still other occasions, White would arrive to work at the New Rochelle Main Branch and be sent elsewhere to work that day.

White was not issued a work phone by Respondent. When communicating with his supervisor for work matters, whether sending or receiving calls and/or messages, he used his personal phone. Notwithstanding the fact that CCAs were not required to answer their personal phones outside of working hours, it is undisputed that Respondent's supervisors routinely continued to attempt to communicate with CCAs outside of working hours.

The Events Leading up to White's Termination

On the day of his termination, April 6, 2018, White was assigned to work at his regular facility, the New Rochelle Main Branch. The previous day, White had not received his next day's assigned location in person, but instead, received this assignment after hours on April 5 by text from Bardis.

On the morning of April 6, White observed that he had multiple missed calls from Bardis and Cail. While on the bus en route to New Rochelle, he called back and spoke to Bardis, who advised that he wanted White to report to Respondent's Scarsdale facility that day, rather than to New Rochelle where he was scheduled.[7] White had never been assigned to this facility before, and he did not know where it was located. So, White told Bardis that since he was already on his way to New Rochelle, he would speak to him when he got there. According to White, Bardis seemed fine with that plan, and said it was okay. Bardis did not ask where the bus was or tell White where the Scarsdale facility was located. He also did not advise or ask how White would get to the Scarsdale facility by bus.

According to Bardis, when he spoke with White on the phone to give him his changed assignment, White told him that he did not want to go to the new location, and that he would not go there. Bardis maintains that White told him he was coming to pick up his check at New Rochelle, and that was where he was going to work that day. When Bardis told White he could discipline him for refusing an assignment, White just insisted that he was coming to New Rochelle. In a subsequently prepared

[4] It is nevertheless undisputed that based on his January 6, 2018 official start date, White was still within the 90-day probationary period applicable to CCAs on the date he was terminated.

[5] Not having to answer personal phones outside of working hours was the product of a grievance settlement reached by the Union in response to an alleged pattern of CCAs being called for business purposes during off hours. (GC Exh. 2).

[6] Usually, the assignments would come from Bardis, although at times Cail also contacted White and other employees about their assignments.

[7] Respondent's witnesses clarified that the specific assignment for that day was to its Hartsdale facility, one of multiple facilities located in Scarsdale, NY. There is not a dispute over what location White was to be assigned to that day, and I will refer to it as the Scarsdale facility herein.

statement by Bardis, echoed second-hand in a separate statement by Cail, both allege that White insisted he would not work in Scarsdale and that he said they could suspend him for refusing but it would not change his mind.[8]

When White arrived to New Rochelle, he went directly to speak to Bardis about his assignment, but when he met him, Bardis asked White why he was not at Scarsdale. White told Bardis that since he was already on the bus to New Rochelle, he just came in, but that he was fine with going to Scarsdale. It was not unusual for White to be sent to work at a different location after arriving to New Rochelle, and there is no suggestion that he was ever resistant to working at any other location.

However, at that point, Bardis told him it was too late, and that White was already in trouble. Bardis told White that they would have to speak with Postmaster DiPasquale, and so they went together to a private office which was separated from the Postmaster's office by a conference room. Once there, Bardis closed the door and the two men were alone in the room.

While they were alone in the office, Bardis told White again that he was in trouble, and that he was either going to be terminated or assigned to a rural route as punishment. Bardis gave White a paper to sign which White glanced over briefly. White remembers the paper as being typewritten, with a space for his signature, but with no handwriting.[9]

At that point, White told Bardis that he needed someone to help him review the document before signing it. White did not specifically say he needed a Union representative, but Bardis apparently understood the request, and responded by telling White he was only a CCR and did not have that right. White refused to sign the document.

The two men then left that office and went to a conference room next door where Cail was present. Cail testified that she was there because she and DiPasquale could hear the two men yelling from the Postmaster's office, although not the exact words, and she was going to bring them to meet with her and DiPasquale. While in the conference room, in Cail's presence, White reiterated his request to speak to someone who can help him, but neither of the supervisors responded to his request.

Postmaster DiPasquale entered a few minutes later, and White began to tell him that he was not refusing to go to Scarsdale, just that he was already on the bus en route to New Rochelle. White asked again for someone to speak to, but DiPasquale told White that this was not his time to talk. White responded saying that "I have rights, and I want to talk to somebody," to which DiPasquale replied, "You have no rights." White insisted that "I'm an American, and I know I do," but DiPasquale just told him at that point that he was terminated, and told Cail to call the police.

White told the managers that he was not leaving until he was allowed to speak to someone, whereupon he called the Union and spoke to DiStefano. At this point, Bardis was still present, but DiPasquale had left and Cail had gone to call the police. White explained to DiStefano over the phone what had happened, including the fact that White had requested assistance, and that DiPasquale had ordered him out of the building. DiStefano told White over the phone that he needed to leave, and White then left the office before any police arrived. In total, about five minutes had passed from the time DiPasquale told White that he was terminated until the time White had left the facility.

All three managers maintain that White was belligerent from his first interaction with Bardis and continuing until after he was terminated, and shouting about having unspecified rights as an American, loudly using the "F" word as he shouted. White denies raising his voice at any point during the meeting with Bardis alone and acknowledges only that he did get a little upset when he repeatedly called attention to what he believed was a denial of his rights. He denies using the "F" word at any time that day.

After speaking with White, DiStefano called DiPasquale and asked what happened. DiPasquale advised that he was removing White from service and that he was going to call the police if he did not leave.[10] DeStefano asked DiPasquale why he did not give White a Union representative when he asked, and DiPasquale told him that CCAs on probation do not have the right to a representative. DiPasquale later apologized to DeStefano for saying this, acknowledging he was mistaken about CCA's rights, but then maintaining that White's request came after he was already terminated.

By letter dated April 7, 2018, White was advised that he had been terminated for refusing to follow instructions, attendance related issues and insubordination. (GC Exh. 5). At trial, DiPasquale acknowledged that neither the alleged refusal to follow instructions nor the alleged attendance issues were the real reason for his termination, but that the real reason for White's termination was the alleged insubordination at the April 6 meeting.

White's Performance and Attendance

For the first two months of White's employment, he was not issued a time card to record his hours worked. Instead, his supervisor would record his hours manually. Upon receiving a time card, for the final few weeks of his employment, he would punch in to record his hours. At no time prior to the day of his termination was White disciplined or counseled in any way for attendance or timeliness issues.[11]

White remembers shadowing another employee for a few weeks in January as part of his training, although his first day of

[8] I credit White's version of this interaction. He testified with a sincere and honest demeanor, and his version was far more plausible. He frequently worked at locations other than New Rochelle, and there was nothing that would prevent him from picking up his paycheck and then traveling, on the clock, to his newly-assigned location. Additionally, I generally did not find Bardis to be a reliable or credible witness throughout his testimony. He appeared to be testifying more from a rehearsed script than from his actual recollection. To the extent White and Bardis offered conflicting or inconsistent testimony, I credit White, as I found him to be a more forthright and reliable witness.

[9] It appears that the document which White remembers is an "Employee Evaluation and/or Probationary Report," which Bardis acknowledges presenting to him at that time. (R. Exh. 8).

[10] At this point, DiPasquale had left the conference room and was not aware that White had also left the premises.

[11] Bardis testified that White had been AWOL on one of more occasions, but that he just let it go because White was a good employee. However, there was no documentary evidence produced to substantiate Bardis's claim, and I do not credit this testimony.

work for purposes of calculating his probationary period was January 6, 2018. The parties' CBA provides for performance evaluations to be given to probationary employees at the 30, 60 and 80 day points of their probationary period. White never received a performance evaluation for any of these periods. White also never received any discipline for performance prior to the day of his termination.

On the day of his termination, during the initial meeting when only White and Bardis were present, Bardis claims to have prepared an evaluation for White, and reviewed it with him. The report contained notations purporting to have been made on prior dates, but with no signature from White, or any indication that White refused to sign. Bardis admitted that he had not actually evaluated White at the 30-day point, but maintained that he had done so at the 60-day point, after which he had given the report to Cail. Cail testified this was not the case.

I do not credit Bardis's testimony regarding the alleged performance notations he claims to have made for White on his Employee Evaluation and/or Probationary Report. Bardis displayed confusion with Respondent's own evaluation process and appeared to be testifying based not on his recollection, but rather, from the documents presented to him, which he appeared barely to recognize.

Analysis

A. Respondent violated 8(a)(1) of the Act on April 6, 2018, when it refused to permit White to speak with a representative prior to continuing the meeting with management.

An employee in a unionized workplace has the right, under Section 7 of the Act, to refuse to submit, without union representation, to an investigatory interview by his employer that may reasonably lead to discipline. *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 256–257 (1975); *IBM Corp*., 341 NLRB 1288 (2004). As the Supreme Court observed in *Weingarten*, this is an important right that "safeguard[s] not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment." Id. at 260.

An employee's *Weingarten* rights apply only to *investigatory* interviews. Those rights do not extend to a meeting held solely for the purpose of communicating to an employee a final decision to impose a certain discipline, which was made prior to the meeting. *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). In addition, in order to invoke the right to have a union representative present for a meeting with their employer, an employee must reasonably believe that the investigation could result in disciplinary action being taken against them. *Weingarten*, at 257.

Here, there can be no doubt that this was an investigatory interview which White would reasonably have believed could result in disciplinary action. Indeed, upon White's initial arrival to the New Rochelle facility, Bardis told him he was in trouble and needed to speak with the Postmaster. And, Bardis took White to a private office to discuss with him the events of that day and his performance. In addition, Respondent maintains that the decision to terminate White was made during the meeting, not before. So, this was not a meeting held merely for the purpose of communicating a final decision.

Significantly, the right to a representative arises only when the employee requests representation. *Weingarten*, at 257. A failure to request representation would defeat a Weingarten allegation. *Kohl's Food Co.*, 249 NLRB 75, 78 (1980). However, there is no precise language which must be used. The request merely must be sufficient to put the employer on notice that the employee wishes to have union representation. *Consolidated Edison*, 323 NLRB 910 (1997); see also *Houston Coca-Cola*, 265 NLRB 1488, 1496-1497 (1982) ("No magic or special words are required to satisfy this element of the Weingarten rationale").

So, for example, questioning an employer as to whether a representative should be obtained – "Do I need to get somebody in here?" - has been held sufficient to trigger *Weingarten* rights. *General Die Casters*, 358 NLRB 742 (2012). Similarly, an employee request that "someone" be present is sufficient to invoke *Weingarten* rights. *Circuit-Wise*, 308 NLRB 1091, 1108-1109)(1997), enf'd. 992 F.2d 319 (2d Cir. 1993). Even a remark as simple as "Do I need a witness?" has been found to be a valid request for union representation. *Bodolay Packaging Machinery*, 263 NLRB 320, 325-26 (1982).

Here, I credit White's testimony that he specifically requested to speak to someone to assist him in his initial meeting with Bardis, and that Bardis told him there was no one to speak to, and that as a CCA, he was not entitled to that. I also credit White's testimony that he reiterated his request to Bardis and Cail, but was ignored. I do not credit either Bardis or Cail in their denials about White's request.

Moreover, I credit White's testimony that he asked for someone immediately upon DiPasquale's arrival, which is consistent with the fact that he had already asked both Bardis and Cail for someone to speak to and had his request denied and/or ignored. And I credit White's testimony that DiPasquale dismissed his request, as it is consistent with DiPasquale's admitted belief that White was not entitled to one.[12]

Finally, I do not credit DiPasquale's claim that White did not ask for a representative until after he was terminated. Both he and Cail acknowledge that White was speaking from the moment DiPasquale entered the room, before any action was taken. Additionally, it is undisputed that White repeatedly told all three supervisors that he had rights, and I find that having already requested a representative from each of them, it was plain to all three managers what rights he was referencing.

Accordingly, I find that Respondent violated 8(a)(1) of the Act on April 6, 2018, when it refused to permit White to speak with a representative prior to continuing his meeting with management.

B. Respondent violated Section 8(a)(1) of the Act on April 6, 2018, when it terminated White because of his protected concerted activity.

The discharge in this case presents a separate question, and compels a *Wright Line* analysis for determining when an

[12] DiPasquale admitted to DeStefano only after the fact that he had mistakenly believed that CCRs were not entitled to a representative.

allegedly discriminatory action violates the Act. Under *Wright Line*, the General Counsel must first make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the employer's terminating of the alleged discriminatees. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB No. 126, slip op. at 1 (2015). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes that showing, the burden shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.,* 346 NLRB 494, 496 (2006). An employer "cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." W.F. Bolin Co., 311 NLRB 1118, 1119 (1993).

Further, if the employer's proffered reasons are pretextual - either false or not actually relied on - the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons absent the protected activity. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Pro-Spec Painting, Inc.,* 339 NLRB 946, 949 (2003); and *Hays Corp*., 334 NLRB 48, 49 (2001).

Here, I find White clearly engaged in protected activity by virtue of his initially requesting a union representative in his meeting with Bardis, reiterating that request in his meeting with Bardis and Cail, asking again at the start of his meeting with Bardis, Cail and DiPasquale, and when he insisted during that meeting that he "had rights" to that requested assistance.[13] As discussed in the previous section of this decision, I find that Respondent was aware of White's activity.

As for animus, I find the Employer's formal letter of discharge, attributing White's termination first to a refusal to follow instructions, then to attendance related issues, and finally to insubordination, to be pretextual excuses designed to avoid liability and therefore, evidence of Respondent's animus. Accordingly, I find that White's concerted activity was a substantial and motivating reason for his discharge, and as such, I find the General Counsel has met its initial prima facie burden.

With the burden shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct, I find that Respondent has failed to meet its burden. First, as noted above, I find that Respondent's attempt to supplement and bolster the rationale for White's termination with additional bases that even DiPasquale acknowledged were not real reasons was plainly pretext. See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

Moreover, I find that Respondent would not have discharged White had he not requested the assistance of a union representative for his interview with management on April 6, 2018, and insisted that it was his right to have that assistance. I find nothing of significance occurred between his request for a union representative and his discharge except for his insistence that he was entitled to that. That timing, given the totality of the circumstances in this case, cannot be ignored.

Therefore, I find that Respondent has not met its burden under *Wright Line*, and that it cannot prove it would have taken the same action against White even in the absence of his protected conduct. Indeed, I find that it would not have discharged White but for the intervening act of his asserting his *Weingarten* rights.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when it terminated White on April 6, 2018, and therefore, recommend that White be made whole for the unlawful actions taken by Respondent.

Conclusions of Law

1. On or about April 6, 2018, Respondent violated Section 8(a)(1) of the Act by denying Christopher White his right to have a union representative present for an investigatory interview which he reasonably believed could result in discipline, in violation of his *Weingarten* rights.

2. On or about April 6, 2018, Respondent violated Section 8(a)(1) of the Act by unlawfully terminating White's employment in retaliation for his protected concerted activity, specifically, his assertion of his *Weingarten* rights.

3. The above violations are unfair labor practices within the meaning of the Act.

Remedy

As I have concluded that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent, having discriminatorily discharged Christopher White, must rescind its unlawful discipline, offer White reinstatement and make him whole for any loss of earnings and other benefits resulting from that discrimination.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

In addition, Respondent is ordered to reimburse White for all search-for-work-related expenses regardless of whether he

[13] I note that, although not asserted by the General Counsel, the entire chain of events leading up to White's termination began with the Employer calling White on his personal phone outside of working hours, to which White objected based on the prior settlement between the Union and the Employer that covered the entire bargaining unit, which objection was arguably protected concerted activity in itself.

received interim earnings in excess of these expenses overall or in any given quarter. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, United States Postal Service, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing the requests of employees for union representation during investigatory meetings which they reasonably believe may result in discipline;

(b) Discharging or otherwise discriminating against any employee for engaging in activity protected by Section 7 of the Act;

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Christopher White full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Christopher White whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision, plus reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

(c) Compensate Christopher White for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Christopher White and, within 3 days thereafter, notify him in writing that this has been done and that neither those disciplines nor discharge will be used against him in any way.

(e) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Main Branch location in New Rochelle, NY the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at the New Rochelle Main Branch facility at any time since April 6, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated; Washington, D.C. May 3, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT refuse the requests of employees for union representation during investigatory interviews they reasonably believe may result in discipline.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in protected concerted activities.

WE WILL NOT n any like or related manner, interfere with, restrain or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Christopher White full reinstatement to his former job, or, if that

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher White whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

WE WILL compensate Christopher White for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Christopher White, and WE WILL within 3 days thereafter, notify him in writing that this has been done.

UNITED STATES POSTAL SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-219434 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.